Conducting Discovery in a §1983 Case

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PREPARING FOR DISCOVERY

REVIEW RELEVANT RULES GOVERNING DISCOVERY:

- The Federal Rules of Civil Procedure (FRCP).
- The district court's local rules.
- The district court's standing, administrative, or general orders.
- The individual practice rules for the district and magistrate judge assigned to the case.

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CONDUCT A PRELIMINARY INVESTIGATION REGARDING THE ALLEGATIONS:

- Secure assistance from agencies or records custodians to collect relevant documents and evidence.
- Ensure that defendant officers or their agencies have provided municipal counsel with all relevant documents and information.

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LITIGATION TIP # 1 – UNSEALING OF UNDERLYING CRIMINAL RECORDS

- Depending on the jurisdiction, some records in the possession and custody of the individual defendant and/or the municipality may be sealed from the defendants themselves. For example:
  - Criminal records underlying the incident if the matter was dismissed.
  - Medical records associated with the underlying incident.
  - Court files.

- Without legal access to these records, it may be impossible for defendants to properly investigate the allegations, evaluate representation issues, and properly respond to the complaint.
- Immediately upon being served, request that plaintiff provide a release to unseal all criminal records related to the underlying criminal matter.
- Depending on state law, a court order from the local criminal court may be required as well.

- Consider also seeking an extension of time from the court to respond to the complaint.
  - This will allow municipal counsel time to respond to the complaint in a more educated manner and head off any conflict of interests as municipal counsel, causing further delay.

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REVIEW READILY AVAILABLE AND RELEVANT DOCUMENTS FOR POTENTIALLY DISCOVERABLE INFORMATION, INCLUDING:

- Pleadings.
- Arrest and prosecution records.
- Witness Statements.
- Internal police department or municipal investigation records.
- Defendant and witness police officers' disciplinary and personnel records.
- Social media posts of all parties.
- Plaintiff's publicly available criminal records.
- Related state court actions or filings.
- Prior lawsuits involving the plaintiff or individual defendants.
- News or media coverage of the underlying incident, criminal case or litigation.

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MATERIALS IN THE POSSESSION OF OTHER GOVERNMENT AGENCIES:

- Often relevant materials are within “municipal control” but not the control of the individual police officer defendant or the police department generally.
- Depending on the size of the municipality, its agencies, the relationship among agencies or departments and your role as municipal counsel, obtaining these records might be as simple as a phone call or as complex as a formal litigation hold made to the general counsel of the particular agency.
- Examples of this type of material are:
  - jail or prison records from department of corrections;
  - court records from various local, state and federal courts;
  - medical examiner records from coroners’ office or department of health;
  - child protective services records from family services agencies.

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ADDRESS REPRESENTATION ISSUES

If the plaintiff named both an individual officer and the municipality as defendants, determine if any conflict of interest exists such as:

- Conflicting defenses between the municipality and the officer defendants.

  For example:

  - improper training by the municipality; or
  - the alleged unconstitutional actions were the result of a command by a superior officer.
  - A finding of wrongdoing against the officer defendant by the municipality.

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If There Are Any Concerns or Questions About Whether Representation of the Individual Defendants is Appropriate

Do NOT

Meet with the Individual Defendants Until it is Resolved

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LITIGATION TIP # 2 – WRITTEN NOTICE OF POTENTIAL CONFLICT

- Clearly advise the individual defendant of your role as both counsel for the municipality and the individual defendants, as employees of the municipality (even if the municipality is not named as a defendant.)
- Request that defendant waive, in writing, any potential conflict of interest, due to counsel's role as counsel for municipality.
- This will relieve counsel of any professional and ethical concerns, should counsel be required to provide communications between counsel and the individual defendant to their superiors or the municipality.
- A standardized letter that lays out the issues and requires a signature of acknowledgment by the individual defendant can make this process easier.

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MEET WITH THE INDIVIDUAL DEFENDANTS

- If representing the individual officer defendant, meet with the defendant to:
  - Explore the defendant's version of events.
  - Determine what relevant documents may be in defendant's possession or exist elsewhere in connection with the case.
  - Discover the identity of other potential police personnel and civilian witnesses.

- If there is an expectation that municipal counsel will provide representation but has declined to do so, inform the individual officer in writing.
- Be sure to provide the officer notice in a timely manner so that they can secure counsel and timely respond to any deadlines.

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BALANCING BURDEN OF DISCOVERY EQUALLY

There is often a misconception or presumption by plaintiff and the courts, that most of the relevant documents and information are either already in the defendant's possession and control or more easily obtained by the defendant (due to access or resources).

- Appropriate use of municipal resources, which are tax-payer dollars and not unlimited.
- Plaintiffs who are not financially invested in the litigation have no incentive to end the litigation either by withdrawing a meritless claim or settling.
- Access to documents and information may be just as simple or difficult for both parties.
  - Plaintiff may already be in possession of these records from the underlying criminal matter or through a pre-discovery public records request.
  - Often defendant is required to subpoena these records, therefore it is just as accessible to plaintiff through subpoena..
  - Some of these documents and information may be publicly available.

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TIMING AND SEQUENCING OF FACT DISCOVERY

BIFURCATE MONELL DISCOVERY

- A successful Monell claim against the municipality always requires proof of an actual constitutional violation against the plaintiff.
- Without that, any Monell claim will fail, even if there is clear evidence of improper policy, practice or custom of the municipality.
- Monell discovery is often:
  - Extremely costly
  - Time consuming.
  - Involve voluminous amounts of documents and other records.
  - Require the deposition of high-ranking and retired employees of the municipality.
- Counsel should seek to bifurcate Monell discovery until the conclusion of fact discovery. This will preserve precious municipal resources and tax pay dollars.

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TIMING AND SEQUENCING OF FACT DISCOVERY

LITIGATION TIP # 4 – BIFURCATE DISCOVERY

- Consider requesting *Monell* discovery be stayed until after dispositive motions on the individual claims.
- A court will likely be most responsive to this request when:
  - Plaintiff has an individual claim that relies heavily on expert witnesses or is otherwise difficult to establish
  - Plaintiff has not set out a very well pled claim or clearly articulated what *Monell* discovery they seek, and instead appear to be on fishing expedition.
  - Plaintiff is seeking large amounts of *Monell* discovery that will be costly and burdensome on municipal resources

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TIMING AND SEQUENCING OF FACT DISCOVERY

SEEK A STAY PENDING RESOLUTION OF A CRIMINAL MATTER OR INVESITGATION

- In addition to the Section 1983 litigation there may also be:
  - A contemporaneous criminal investigation or prosecution of the plaintiff (from the underlying incident.)
  - An investigation or criminal prosecution of the defendant police officers.
- These other proceedings may affect the Section 1983 lawsuit, and the lawsuit may inappropriately affect the other proceedings.
  - A criminal defendant does not have to testify in a criminal proceeding, but if they chose to "take the Fifth" in the contemporaneous civil case they risk having a negative inference drawn against them.
  - police officers are often contractually or statutorily required to participate in the defense of the litigation or risk losing their representation by municipal counsel.
- Counsel should consider seeking a stay in the interest of justice, pending the resolution of the criminal matter. To continue would require the subject of the criminal matter (plaintiff, defendant or both) to:
  - Be forced to choose between liberty and civil damages.
  - Risk losing municipal representation.

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FINDING DISCOVERABLE INFORMATION

DOCUMENTS AND INFORMATION THAT PLAINTIFF MAY USE TO SUPPORT THEIR CASE

- Medical records detailing the alleged injury.
- Photographs, video or audio recordings of the alleged incident.
- Evidence of physical interaction or use of force.
- Documentation of any financial loss as result of the incident.
- Civilian witnesses.
- Police and other government witnesses.

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FINDING DISCOVERABLE INFORMATION

DOCUMENTS AND INFORMATION THAT DEFENDANT CAN USE TO SUPPORT THEIR DEFENSE AND MITIGATE DAMAGES

- Criminal history and previous experiences within the criminal justice system and incarceration.
- Litigation history.
- Employment and educational history.
- Prior physical and psychological medical history.
- Finances (for example, tax and banking records).
- Evidence of the underlying criminal charge.

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REQUESTS FOR THE PRODUCTION OF DOCUMENTS

COMMON RECORDS SOUGHT FROM PLAINTIFF IN A 1983 ACTION:

- Medical treatment records from the incident.
- Medical records for the ten years prior to the incident.
- Medical records from any continuing and on-going treatment.
- Financial records, including banking records and tax returns.
- Employment records.
- Family court records.
- Video or audio recordings of the incident.
- Writings that describe the incident.
- Education records.
- Receipts of any costs incurred as a result of the incident.
- Torn clothing or other damaged personal items.
- Copies of any other sworn testimony of the plaintiff.
- Documents obtained through the underlying criminal matter.
- Documents received by plaintiff related to the incident made through a pre-discovery public records request or subpoena.
- Any documents provided to plaintiff by any person plaintiff intends to call as a witness at trial.

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REQUESTS FOR THE PRODUCTION OF DOCUMENTS

- When drafting RFPs, consider:
  - case theory and themes;
  - the information needed to prove claims, defenses, and damages;
  - the information that the opposing party may use to prove its claims, defenses, and damages;
  - which individuals may have relevant documents; and
  - where relevant documents may be located.
- When reviewing plaintiff's responses ensure that the responses are:
  - in writing;
  - responsive and
  - timely. Although written responses typically are due within 30 days of service (unless served under FRCP 26(d)(2)), parties often agree to produce documents within a reasonable time after the written response is served (see FRCP 34(b)(2)(B)).

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REQUESTS FOR THE PRODUCTION OF DOCUMENTS

LITIGATION TIP # 5 – REQUESTING RELEASES

- While it is the plaintiff's obligation to provide records in support of their claims pursuant to FRCP 26 and in response to an RFP, always request a release so that you can request the records directly from custodians to ensure you have the complete records.
- If possible, get a release that seeks records going back ten years from the date of the incident alleged in the Complaint.
- Serve the releases at the FRCP 26 conference, or before if possible, and again with First Set of RFP.

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INTERROGATORIES

- Since the FRCP limits interrogatories to a total 25, counsel should consider whether desired information can be obtained more efficiently through other means, like RFPs, depositions, or RFAs.
- In Section 1983 litigation, defendants commonly use interrogatories to seek information regarding:
  - The identification of fact witnesses.
  - The identification of expert witnesses
  - The identification of relevant documents.
  - The description of physical and psychological injuries.
  - The description of financial or economic damages.
  - The description of legal claims and plaintiff's theory of liability.

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INTERROGATORIES

RESPONSES TO PLAINTIFF'S INTERROGATORIES

- The biggest concern when responding to interrogatories is creating inconsistencies or over answering when asked to provide a narrative response.
- Due to the nature of the police work, police officers are required to document almost all of the facts regarding an arrest, detention or other interaction with a civilian. This includes not only the discreet facts but often also their thoughts, impressions and observations.
- Whenever possible, rather than draft a narrative response that could later create inconsistent testimony, refer plaintiff to the relevant business records pursuant to FRCP 33(d).
- Example of official records that provide contemporaneous recollection of events are:
  - Arrest reports.
  - Investigative Reports.
  - Evidence vouchers.
  - Search warrant affidavits, application and execution reports.
  - Criminal complaints and supporting affidavits.
  - Police officer memo or log-books.
  - Medical records.

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OBJECTIONS AND CLAIMS OF PRIVILEGE BY DEFENDANT

DISCLOSURE CONCERNS OF POLICE DEFENDANTS

- In addition to the common objections to discovery demands, like:
  - Relevancy
  - Vagueness
  - Ambiguous
  - Over broad
- Due to the sensitive nature of police work, the defendants may have additional concerns about the production of certain documents and information.

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OBJECTIONS AND CLAIMS OF PRIVILEGE BY DEFENDANT

DISCLOSURE CONCERNS OF POLICE DEFENDANTS

LAW ENFORCEMENT CONCERNS

- Law enforcement concerns regarding the integrity of policing efforts by:
  - revealing ongoing investigations
  - disclosing undercover locations, safehouses, or operations
  - disclosing policing strategies and investigative methods
  - compromising the collection and preservation of evidence

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OBJECTIONS AND CLAIMS OF PRIVILEGE BY DEFENDANT

DISCLOSURE CONCERNS OF POLICE DEFENDANTS

PRIVACY CONCERNS

- Privacy concerns about revealing the identities and personal information of:
  - undercover police officers
  - confidential informants
  - non-party witnesses
  - non-party employees
  - other arrestees
  - identifying and personal information of officers and their family

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OBJECTIONS AND CLAIMS OF PRIVILEGE BY DEFENDANT

DISCLOSURE CONCERNS OF POLICE DEFENDANTS

SAFETY CONCERNS

- Safety concerns regarding:
  - the institutional safety and integrity of police and corrections facilities
  - the operation of undercover police officers
  - the existence and identities of witnesses and confidential informants.
  - identifying and personal information of officers and their family.

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OBJECTIONS AND CLAIMS OF PRIVILEGE BY DEFENDANT

DISCLOSURE CONCERNS OF POLICE DEFENDANTS

SELF-INCRIMINATION CONCERNS

- Self-incrimination concerns regarding the subject of an ongoing criminal investigation, who may be called to give testimony in the Section 1983 civil action

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OBJECTIONS AND CLAIMS OF PRIVILEGE BY DEFENDANT

PRIVILEGES

LAW ENFORCEMENT PRIVILEGE

- Sensitive documents and information that would expose law enforcement techniques and procedures.
- Any information that could interfere with an ongoing law enforcement investigation.
- The identities of confidential sources and witnesses.
- The identities of confidential or undercover law enforcement personnel.

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OBJECTIONS AND CLAIMS OF PRIVILEGE BY DEFENDANT

The party asserting the law enforcement privilege must show that the documents contain information that would:

- Jeopardize police officer safety and privacy.
- Threaten witness safety and privacy.
- Impact of the effectiveness of law enforcement programs and techniques.
- Risk future investigations and operations by having a chilling effect on citizen complaints and witness candor.

(See *In re The City of New York*, 607 F.3d at 944.)

To overcome the privilege, the party seeking discovery may point to:

- The relevance of the discovery to the plaintiff's case.
- The strength of the plaintiff's overall claims and seriousness of the allegations.
- The plaintiff's inability to obtain the information through other means.
- The public's interest in disclosure.

(See *In re The City of New York*, 607 F.3d at 944.)

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OBJECTIONS AND CLAIMS OF PRIVILEGE BY DEFENDANT

OTHER PRIVILEGES

OFFICIAL INFORMATION PRIVILEGE

- Protects against the disclosure of personal information of law enforcement and police personnel files (*Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1033 (9th Cir. 1990); *Collens v. Cityof New York*, 222 F.R.D 249 (S.D.N.Y 2004)).
- Like the law enforcement privilege, courts balance the potential benefits and disadvantages of disclosure.

DELIBERATIVE PROCESS PRIVILEGE

- Allows the government to withhold documents that contain confidential deliberations of law or policymaking, reflecting opinions, recommendations, or advice (*Bayliss v. New Jersey State Police*, 622 F. App'x 182, 185 (3d Cir. 2015)).
- Similar are the "pre-decisional privilege," "inter-governmental opinion privilege," or "executive privilege." Although they slightly differ in their application or analysis, all aim to protect and improve the quality of government decision making by encouraging open discussion among government officials (*Fed. en Market Comm. v. Merrill*, 443 U.S. 340 (1979)).

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OBJECTIONS AND CLAIMS OF PRIVILEGE BY DEFENDANT

PROTECTING SENSITIVE INFORMATION

- To expedite discovery and avoid potential discovery disputes, counsel may negotiate a compromise for a production that will satisfy both parties.
- Often the disputed materials are not relevant to plaintiff's claim so they are willing to allow for their redaction or removal from discovery.
- The parties can negotiate the terms of the confidentiality agreement as they deem appropriate, subject to the court's approval. Common provisions in confidentiality agreements in Section 1983 actions provide for:
  - Attorney's Eyes Only
  - No copying of disclosed materials and all originals returned after litigation.
  - Confidential materials not filed unless sealed by the court.
- The parties can also agree to limit the scope of discovery to:
  - A specific timeframe (for example, within five or ten years from the incident alleged in the complaint).
  - To information directly related to the specific types of allegations in the complaint.

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DEPOSITIONS AND AFFIDAVITS

COMMON DEPOSITIONS IN SECTION 1983 ACTIONS

Parties in a Section 1983 case often seek to depose:

- The plaintiff.
- The defendant.
- Persons present at the alleged incident, including:
  - law enforcement officers
  - first responders
  - persons arrested with the plaintiff
  - persons incarcerated with the plaintiff
  - Prosecutors.
  - Medical examiners.
  - Child protective services personnel.
  - Probation personnel.
  - Corrections personnel.
- Medical personnel who treated the plaintiff or the defendant, including:
  - EMTs and paramedics
  - emergency room physicians and nurses
  - follow-up treating physicians and therapists

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DEPOSITIONS AND AFFIDAVITS

COMMON DEPOSITIONS IN SECTION 1983 ACTIONS

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- Other
  - Non-parties the plaintiff may have discussed the incident with or who may have knowledge of the plaintiff's condition before or after the incident. These people may include friends, family members, and persons incarcerated with plaintiff.
  - Friends and family members of the plaintiff.
  - Persons who can authenticate important documents.
  - Anyone the parties disclose through discovery as having relevant knowledge and information.
  - Anyone the parties include on a witness list, who may testify at trial in person, or who may submit affidavits.

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DEPOSITIONS

LITIGATION TIP # 6- PRESERVING TESTIMONY OF NON-PARTY WITNESSES

- Unless prevented by local rule or court decision, counsel is free to speak informally with any non-party witness.
- Depending on the facts of the case and the relationship to the parties, it may be strategically beneficial to meet with the non-party witness(es) informally and secure an affidavit of their statement rather than conduct a deposition.
- The affidavit can be used in a dispositive motion or for impeachment during cross-examination, if needed, just like deposition testimony.
- However, this approach, will preclude plaintiff of taking advantage of your deposition to question the witness and may prevent plaintiff from even being alerted to the significance of the witness at all.
- Be aware that the non-party may be deposed or otherwise questioned about these informal discussions and/or creation of the affidavit.

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